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No. 942

IN THE

Supreme Court of the United States

_____TERM, 1942

BRYAN COUNTY, STATE OF OKLAHOMA, and the BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

PETITIONERS,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVIEW AND DETERMINATION, THE CASE OF BRYAN COUNTY, STATE OF OKLAHOMA, AND THE BOARD OF COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA, APPELLANTS VS. THE UNITED STATES OF AMERICA, APPELLEE, AND BRIEF IN SUPPORT THEREOF.

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State of Oklahoma,

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February, 1942.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action brought by the United States of America for and on behalf of one Minnie Brewer, one-fourth degree Choctaw, and Lake Brewer, Choctaw citizen by marriage, alleged Indian Wards of the Federal Government, against Bryan County, Oklahoma, a Body Politic and Quasi-Public Corporation, and Board of County Commissioners of Bryan County, Oklahoma, for the recovery of taxes in the amount of $223.47, with interest allegedly wrongfully exacted from Minnie Brewer and Lake Brewer, during the years 1908, 1909, 1910 and 1911, on certain allotted lands owned by them, in Bryan County, Oklahoma, which were exempt from taxation during said years by certain Acts of Congress. The material facts were stipulated and are substantially as follows (R. 34-54):

Minnie Brewer, quarter-blood Choctaw Indian, and Lake Brewer, an intermarried white citizen of the Choctaw Nation, each received homestead and surplus allotments in Bryan County, from the United States under the Acts of June 28, 1899, c. 517, 30 Stat. 495, and July 1, 1902, c. 1362, 32 Stat. 641, which were non-taxable and inalienable thereunder. These lands became alienable when restrictions against alienation were removed from allotted lands of allottees, enrolled as intermarried whites and as

mixed blood Indians having less than one-half Indian blood, by Section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312.

The county officials of Bryan County, believing that the allotted lands aforesaid, together with other lands in the same class, were subject to taxation since the restrictions thereon were removed by the Act of May 27, 1908, and as appeared to be authorized by Section 4 thereof, placed said lands upon the tax rolls of the county, and, during 1908-1911 inclusive, collected $223.47 from the Brewers. This belief was supported by decisions of the Supreme Court of the State of Oklahoma until the Supreme Court of the United States, in 1912, in *Choate* v. *Trapp*, 224 U. S. 665, 56 Law Ed. 941, involving taxes on similar allotments, held that such allotments remain tax-exempt despite the removal of restrictions against alienation of the 1908 Act.

It is admitted that said lands were exempt from taxation during said period aforesaid, and said taxes paid by the Brewers were from unrestricted funds, and have admittedly long since been appropriated and expended for the proper administration of county government.

That subsequent to the payment of the taxes involved herein and prior to March 27, 1914, the Brewers, admittedly unrestricted Indians, for a valuable consideration, bargained, sold and assigned all their right, title and interest, in and to their claims for refund of said items of taxes involved herein, to George R. Broadwell of Oklahoma City,

Oklahoma. It is admitted that, at the time of the execution of the assignment and delivery thereof to Broadwell, the Brewers were citizens of the State of Oklahoma and *were possessed of all the powers and privileges necessary to make said assignment. The lands upon which said taxes were paid were unrestricted allotted lands.*

On or about March 27, 1914, the said George R. Broadwell presented a petition to the Board of County Commissioners of Bryan County, Oklahoma, predicated upon said assignments from the said Minnie Brewer and Lake Brewer, as well as upon similar assignments from several other members of the Choctaw-Chickasaw tribes of Indians, demanding the return, among others, of the very items of taxes upon which the United States Government in this proceeding seeks to recover from Bryan County and the Board of County Commissioners of Bryan County. That there were approximately 1462 separate causes of action set forth in said petition, and it is admitted that the items of taxes involved herein were the same identical taxes involved in said petition filed by the said Broadwell.

Thereafter, on April 7, 1914, the Board of County Commissioners of Bryan County disallowed said petition and Broadwell appealed to the District Court of Bryan County. The District Court of Bryan County sustained a demurrer to Broadwell's petition, on July 23, 1918, and he appealed to the Supreme Court of the State of Oklahoma. On May 2, 1922, the Supreme Court of Okla-

homa interposed the bar of the Statute of Limitations to Broadwell's petition, and denied the petition for rehearing therein, on January 23, 1923. *Broadwell* v. *Board of Com'rs. of Bryan County*, 88 Okla. 147, 211 Pac. 1040.

Thereafter, Broadwell made application to the Supreme Court of the United States for *writ of certiorari* in said matter, and said Court, in the case of *George R. Broadwell* v. *County Com'rs. of Bryan County*, 262 U. S. 740, 66 Law Ed. 1214, denied said writ, on May 7, 1923, thus making the decision of the Supreme Court of Oklahoma final. It is admitted that the United States of America was not a party in said case.

In 1939, following refusal of a demand by a United States Probate Attorney for the Five Civilized Tribes, upon the Board of County Commissioners of Bryan County, for return of the taxes paid by the Brewers, the United States filed the present action on its own behalf, and on behalf of the Brewers as its Indian Wards, seeking recovery of the taxes, a declaration of the invalidity of the tax proceedings, and cancellation of the assessments, and the order of the Board of County Commissioners placing the allotments on the tax rolls during 1908-1911 inclusive. The defendants interposed jurisdictional objections to the complaint, first by a motion to dismiss (R. 22-25), and then by answer (R. 26-34). The case was submitted to the court upon stipulation of facts (R. 34-54). The District Court of the United States, Eastern District of Oklahoma, entered judgment on January 6, 1941, in favor of the plaintiff, in the

amount of $223.47, with costs, but denied the interest. Appeal was perfected to the Circuit Court of Appeals of the Tenth Circuit, in which the judgment of the District Court was affirmed on November 12, 1941 (123 Fed. [2d] 782).

STATEMENT OF POINTS RELIED ON BY PETITIONERS

Following are the points relied on by the petitioners in this appeal:

a. That the United States was without authority to maintain, and the District Court of the United States and Circuit Court of Appeals were without jurisdiction to hear and determine, this action to recover advalorem taxes wrongfully assessed and collected by State sovereignty upon unrestricted allotted lands belonging to unrestricted Indians, who had, prior thereto, for a valuable consideration, bargained, sold, conveyed and assigned all their right, title and interest in and to their claim for refund of said taxes.

b. That the above courts were without jurisdiction over the subject matter and of the parties to this action for the reason that Minnie Brewer one-fourth degree Choctaw, and Lake Brewer, intermarried white citizen, admittedly unrestricted Indians, are the real parties in interest rather than the United States, and are no longer wards of the Federal Government, and hence there is no diversity of citizenship.

c. That the above courts were without jurisdiction for the reason that the adverse adjudication by a State court

of competent jurisdiction over the same subject matter, to which the same unrestricted Indians herein were privy, as assignors for value of the claims for refund, constitutes *res adjudicata* as to the United States, even though the United States was not a party to the proceedings.

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. That the opinion of the Circuit Court of Appeals holds in effect that the United States Government can maintain an action to recover on a claim for the refund of taxes paid by an unrestricted Choctaw Indian of one-fourth degree Indian blood and Choctaw citizen by marriage (no Indian blood) on unrestricted allotted lands in violation of their treaty rights, which claim for refund had been legally and validly sold, transferred and assigned by them prior to the institution of the Government's action, to one George R. Broadwell, a white citizen of Oklahoma, who by reason of his assignment would be entitled to the proceeds of any judgment rendered. That said opinion in so holding is contrary to the opinion of the Supreme Court of Oklahoma in the case of *Broadwell* v. *Board of County Com'rs. of Bryan County*, 88 Okla. 147, 211 Pac. 1040, *certiorari* denied, 282 U. S. 749, 66 Law Ed. 1214, wherein the Supreme Court of Oklahoma held that Broadwell, as the assignee and owner of said claims for refund, was not entitled to recover.

2. The right of the United States Government to maintain an action to recover taxes levied and paid by unrestricted Choctaw Indians on tax exempt allotted lands in violation of their treaty rights, after the claim of said Indians for refund of said taxes had been validly assigned, sold and transferred, and after the right of said assignee to recover such taxes from the county to which same were paid had been adversely decided by a final judgment of the Supreme Court of Oklahoma, is an important federal question which has never been settled by this Court. That said question is of extreme public importance to the several counties of the State of Oklahoma and will affect the maintenance of numerous actions involving many thousands of dollars in each of the counties of Oklahoma located within the former Indian Territory where similar assignments of claims for refund have been made by unrestricted Indian allottees to third persons.

Should the Government prevail in this action, it would result in a great financial burden to many of the counties in the Indian Territory part of Oklahoma, and would probably necessitate the levying of ad valorem taxes by the various counties on lands belonging to citizens other than of Indian blood to pay this judgment as well as others that would follow.

3. That the decision of the Circuit Court of Appeals is in conflict with and not in accord with applicable decisions of the Supreme Court of the United States. See

United States v. *Waller*, 243 U. S. 452; *United States* v. *Beebe*, 127 U. S. 338, 32 Law Ed. 121.

4. That the decision of the Circuit Court of Appeals is in conflict with decisions of that court which recognize the rule that a final judgment in a court of competent jurisdiction on the merits between the same parties, or between those in privy with them upon the same claim or demand, is conclusive whether erroneous or not, not only as to every matter offered in the former action, but as to every admissible matter which could have been offered to sustain the claim. See *Swift* v. *Jackson* (C. C. A. 10), 37 Fed. (2d) 237, 240, 241; *Vinson* v. *Graham*, 44 Fed. (2d) 772 (C. C. A. 10); *United States* v. *Lee*, 108 Fed. (2d) 936, wherein the Tenth Circuit Court of Appeals on December 21, 1939, held:

> "A State court of competent jurisdiction in Oklahoma may render a valid judgment in respect to unrestricted property of an Indian of the Five Civilized Tribes, and such a judgment constitutes res adjudicata as to the Indian, and it is not open to attack in a later suit brought by the United States, except on jurisdictional grounds, even though the United States was not a party to the suit."

5. That the decision in the case of *Choate* v. *Trapp*, 224 U. S. 679, 56 Law Ed. 941; *Atlantic & Pacific Railroad Co.* v. *Mimgus*, 165 U. S. 413; *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Heckman* v. *United States*, 224 U. S. 413; *Mullen* v. *United States*, 224 U. S. 448; *United States* v. *Minnesota*, 270 U. S. 181, and *United States* v. *Creek Na-*

tion, 295 U. S. 103, upon which the Tenth Circuit Court of Appeals relied in rendering its decision herein complained of are not applicable to the case at bar.

Furthermore, the decision in the case of *Board of County Commissioners of Tulsa County, Oklahoma* v. *United States*, 94 Fed. (2d) 450, and *Board of County Commissioners of County of Jackson, Kansas* v. *United States*, 308 U. S. 343; *Privett* v. *United States*, 256 U. S. 201; *United States* v. *Candelaria*, 271 U. S. 432, upon which the Circuit Court of Appeals relied in rendering this decision are not applicable to the case at bar.

6. That the opinion of the Circuit Court of Appeals in holding that the admittedly unrestricted Indians involved herein are still wards of the Federal Government misconstrued the Act of Congress of May 27, 1908 (35 Stat. 321), and other Congressional Acts. That said Circuit Court is so holding that said unrestricted Indians are still wards of the Federal Government is in conflict with *Blundell* v. *Wallace*, 96 Okla. 26, and *Blundell* v. *Wallace*, 267 U. S. 372, 69 Law Ed. 664; *Cully* v. *Mitchell*, 37 Fed. (2d) 493 (C. C. A. 10); *Choteau* v. *Burnet*, 283 U. S. 691, 75 Law Ed. 1353.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to the Circuit Court of Appeals for the Tenth Circuit, charging said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court had in

the case numbered and entitled on its docket, No. 2308, *Bryan County, State of Oklahoma, and the Board of County Commissioners of Bryan County, Oklahoma, Appellants* v. *United States of America, Appellee*, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals be reversed by the Court and for such relief as to this Court may seem proper.

Copies of the transcript of record in this case in the Circuit Court of Appeals for the Tenth Circuit are filed herewith in conformity with rule No. 38 of this Honorable Court.

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February 7, 1941.